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9 **UNITED STATES BANKRUPTCY COURT**
10 **DISTRICT OF NEVADA**

11 In re:

12 USA Commercial Mortgage Company,
13 USA Capital Realty Advisors, LLC,
14 USA Capital Diversified Trust Deed Fund,
15 USA Capital First Trust Deed Fund, LLC,
16 USA Securities, LLC,²

Debtors.

17 **Affects:**

- All Debtors
- USA Commercial Mortgage Company
- USA Capital Realty Advisors, LLC
- USA Capital Diversified Trust Deed Fund, LLC
- USA Capital First Trust Deed Fund, LLC
- USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR¹
Case No. BK-S-06-10729-LBR²

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725 LBR

**NUNC PRO TUNC MOTION TO
FURTHER EXTEND DEADLINE TO
FILE OBJECTION TO
ALLOWANCE OF CLAIMS
(with Certificate of Service)**

Date: November 18, 2008

Time: 9:30 a.m.

21 The USACM Liquidating Trust (the “USACM Trust”) by Lewis and Roca LLP, its
22 counsel, moves this Court for an order *nunc pro tunc* pursuant to 11 U.S.C. § 502(b) and
23 Bankruptcy Rules 3007 and 9006(b)(1) enlarging the deadline for filing objections to
24 allowance of claims, and in particular unsecured claims, for an additional 120 days from
25

26 ¹ This bankruptcy case was closed on October 12, 2007.
² This bankruptcy case was closed on December 26, 2007.

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1 October 10, 2008 to February 9, 2009. This Motion is based upon the following
 2 Memorandum of Points and Authorities and is supported by the Court's record and the
 3 declarations of Edward M. Burr and John Hinderaker filed this date.

4 **MEMORANDUM**

5 On January 8, 2007, this Court entered its Order Confirming the "Debtors' Third
 6 Amended Joint Chapter 11 Plan of Reorganization" as modified herein [DE 2376]. Notice
 7 of Entry of the Confirmation Order was filed on January 9, 2007, and served on January
 8 11 and 12, 2007 [DE 2387].

9 There is no deadline for claims objections after plan confirmation under either the
 10 Bankruptcy Code or Rules. However, Section VII A.1 Objection to Claims of the Plan
 11 provides:

12 Unless otherwise extended by the Court, objections to the
 13 allowance of Claims and Equity Interests shall be filed and
 14 served upon the entities asserting such Claims or Equity
 15 Interests as follows: (A) for any and all Claims and Equity
 16 Interests to which the General Bar Date applies, ninety (90)
 17 days after the Effective Date....

18 Accordingly, the deadline to file an objection to such Claim was 90 days after the
 19 Effective Date of March 12, 2007, or June 10, 2007. The Court extended the deadline to
 20 October 9, 2007, after a hearing [DE 4097]. The Court extended the deadline to October
 21 15, 2007, by a bridge order after a hearing on August 23, 2007 [DE 4625]. On October
 22 11, 2007, the Court entered an order [DE 4971] extending the deadline to February 12,
 23 2008. On January 22, 2008, the Court entered an order [DE 5709] extending the deadline
 24 to June 12, 2008. On May 13, 2008, the Court entered an order [DE 6347] extending the
 25 June 12, 2008 deadline to October 10, 2008.

26 **I. PROOFS OF CLAIM AND CLAIMS OBJECTIONS**

27 **A. Overview**

28 To date there have been seven administrative claims filed totaling \$2,016,499.08;
 29 103 priority claims filed totaling \$7,751,955.91; 1,676 secured claims filed totaling

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1 \$297,052,436.44; 1232 unsecured claims filed totaling \$627,644,519.30; and 79 unknown
2 claims filed totaling \$649,390.57. Additional claims were scheduled by Debtors.

3 **B. Objections**

4 To date, the Trust has filed:

- 5 • Objections to 1667 secured claims that have been sustained and reclassified
6 as unsecured in aggregate of \$296,160,362.79.
- 7 • Objections to 76 priority claims that have been sustained and reclassified as
8 unsecured in aggregate of \$5,122,243.
- 9 • One objection to the status of an administrative claim totaling \$14,248 that
10 has been sustained and reclassified as unsecured.
- 11 • Objections to 66 “Wrong Debtor” claims in the amount of \$12,098,062. All
12 but one of those objections were sustained or a stipulation withdrawing the
13 subject claim was approved.
- 14 • Objections to three claims not enforceable against USACM in the amount of
15 \$75,503,580; one of these claims totaling \$12,841,680 remains unresolved.
- 16 • Objections to 147 claims for lack of documentation in the amount of
17 \$19,708,808; 23 of these objections to claims totaling \$1,920,750 were
18 withdrawn due to claimants sending in sufficient supporting documents and
19 124 objections were sustained totaling \$17,788,058.
- 20 • Objections to 34 claims on miscellaneous grounds in the amount of
21 \$39,394,064. Two of these objections were sustained totaling \$3,502,383;
22 17 objections have stipulated withdrawals totaling \$4,884,078; five claims
23 totaling \$6,416,532 have orders allowing the claim; and ten objections
24 totaling \$24,591,071 are unresolved.
- 25 • A total of 779 objections to Direct Lenders claims in the amount of
26 \$59,688,216, principally on loans paid in full by the borrowers. The Court

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1 has sustained these objections or the claimants have agreed that they are not
2 making a claim based upon the paid loan in question.

- 3 • A stipulation has been executed and an order signed which provides for the
4 disallowance of the Spectrum and Weddell proofs of claim in the amount of
5 \$125,000,000.

6 The Trust prosecuted objections to claims, including the Loans known as Hasley
7 Canyon; Fiesta Beaumont \$2.4 million; Ashby Financial Company \$7,200,000; Glendale
8 Tower Partners, LLC; Golden State Investments II; 5252 Orange, LLC; Midvale Market
9 Place, LLC; Urban Housing Alliance – 435 Lofts Loan; Boise/Gowen 93, LLC; LCG
10 Gilroy, LLC; J Jireh's Corporation; One Point Street, LLC – HFA North Yonkers; Goss
11 Road Loan; Elizabeth May Real Estate Loan; Slade Development; Wasco Investments,
12 LLC; I-40 Gateway West, LLC 2nd; Cottonwood Hills, LLC; Standard Property
13 Development, LLC; and Palm Springs Marquis Hotel. The Trust has other adversary
14 proceedings pending that constitute claims objections.

15 Further, as the Trust has received information from claimants, it has entered into
16 stipulations for the allowance and disallowance of priority and unsecured claims.
17 Conversely, some claimants have stipulated to either withdraw their claims or have them
18 reclassified as unsecured claims upon discussion with the USACM Trust's counsel.

19 The remaining direct lender claims relate to loans that (1) fully performed, but
20 involve diverted principal; (2) partially performed; (3) are non-performing or still
21 outstanding. The extent to which those loans perform and/or the direct lenders may be
22 compensated from the sale of collateral securing the loans has a major impact on the
23 amount of the claims. The Trustee is handling these claims on a loan by loan basis.

24 Not all of the claims objections can be resolved through motions. The Court has
25 ordered that the Trust's objection to claim 1366 of Los Valles Land & Golf, LLC be
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1 consolidated with a related adversary proceeding filed by the Trust against Los Valles and
2 its guarantor, Dan S. Palmer, Jr.

3 **II. DISCUSSION**

4 This Court has previously considered and granted, after notice, and without
5 opposition, extensions of the Plan's deadline for claim objections under Bankruptcy Rule
6 9006(b)(1), provides that except as otherwise provided by the Rule:

7 when an act is required or allowed to be done at or within a specified period
8 by the rules or by a notice given thereunder or by order of court, the court
9 for cause shall at any time in its discretion (1) with or without motion or
10 notice order the period enlarged if the request therefore is made before the
11 expiration of the period originally prescribed or as extended by a previous
12 order or (2) on motion made after the expiration of the specified period,
13 permit the act to be done where the failure to act was the result of excusable
14 neglect.

15 Here, the request for an extension comes after the October 10, 2008 deadline for
16 filing objections to Allowance of Claims has already expired. Thus, the Court must find
17 good cause for extending the deadline and that the failure to timely request the extension
18 was the result of excusable neglect.

19 This request is supported by good cause. Nothing in the Plan prohibits the Court
20 from extending the deadline for objecting to claims. The previous extension have all been
21 granted without prejudice to further extensions. The Trust has been requesting only 120
22 day extensions so that the Court could monitor the claims process. The other direct lender
23 claims to which the Trustee has yet to object relate to loans that (1) fully performed, but
24 involve diverted principal; (2) partially performed; (3) are non-performing or still
outstanding. The extent to which those loans perform and/or the direct lenders may be
compensated from the sale of collateral securing the loans has a major impact on the
amount of the claims. The Trustee is handling these claims on a loan by loan basis. There
are also some non-direct lender claims to which the Trust may object.

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1 Moreover, as to most of the outstanding loans, Compass (or its successors) and the
 2 USACM Trust (Placer Vineyards) are still attempting to collect on those loans, and,
 3 therefore, it is difficult, if not impossible, to accurately value the claims at this time.

4 For all of these reasons, the USACM Trust believes it needs more than 120 days to
 5 complete its review of the claims and file objections, but asks only for 120 days now, so
 6 that the Court can continue to monitor the claims resolution process.

7 This request for an extension is filed after the deadline has run. Therefore, the
 8 Court must also find “excusable neglect.” In evaluating whether neglect is excusable, a
 9 district court must consider the four factors established by the Supreme Court in *Pioneer*
 10 *Investment Services Co. v. Brunswick Associates Limited Partnership*:³ “(1) the danger of
 11 prejudice to the non-moving party, (2) the length of delay and its potential impact on
 12 judicial proceedings, (3) the reason for the delay, including whether it was within the
 13 reasonable control of the movant, and (4) whether the moving party's conduct was in good
 14 faith.”⁴ The Supreme Court in *Pioneer* rejected a rigid rule for excusable neglect,
 15 applying a broader standard that permitted a finding of excusable neglect even where the
 16 filer was in control of the situation that caused the delay.⁵ Taken together, the four factors
 17 weigh in favor of granting the motion:

18 First, there is no danger of prejudice to the non-moving parties. Indeed, the
 19 opposite is true. If the Court does not grant the extension, then less than valid or
 20 overstated claims will be allowed and those claimants with legitimate claims will be
 21 prejudiced by a diminished distribution.

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³ *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S.
 380, 113 S.Ct. 1498, 123 L.Ed.2d 74 (1993).

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⁴ *Pincay v. Andrews*, 389 F.3d 853, 858 (9th Cir. 2004).

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⁵ 507 U.S. at 386-95 (“[E]xcusable neglect’ . . . is not limited to situations where the
 failure to timely file is due to circumstances beyond the control of the filer.”).

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Second, the delay in seeking the extension is short. This motion seeks a 120 day extension and it is filed less than two weeks after the deadline ran on October 10, 2008.

Third, the failure to timely move for an extension is attributable in part to a serious family medical emergency that arose for the Trustee's attorney who is principally in charge of preparing claims objections.

Fourth, moving counsel has at all times acted in good faith.

III. CONCLUSION

The USACM Trust requests that the Court enter its order *nunc pro tunc* further extending the deadline to file objections to allowance of claims until February 9, 2009, without prejudice to an additional extension.

Dated: October 23, 2008.

LEWIS AND ROCA LLP

By /s/ JH (#018024)

Susan M. Freeman, AZ 4199 (pro hac vice)

Rob Charles, NV 6593

John Hinderaker, AZ 18024 (pro hac vice)

Attorneys for USACM Liquidating Trust

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1 Proof of service

2 Copy of the foregoing posted on the USACM Liquidating Trust website and served on
3 October 23, 2008 via email, where an email address is listed, or by first class mail, postage
prepaid, addressed to:

4 All parties in interest listed on the Post
5 Effective Date Service List on file with
6 the Court and all parties on the pre-
7 confirmation service list, which includes
all direct lenders

8 s/Renee L. Creswell

9 Lewis and Roca LLP

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